IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JOY ELAINE SEXTON, Plaintiff

v. No. 2:99CV076-EMB

COMMISSIONER OF SOCIAL SECURITY, Defendant

O P I N I O N

This matter is before the court on an application by the plaintiff, Joy Elaine Sexton, seeking judicial review under 42 U.S.C. §405(g) of the final decision of the Commissioner of Social Security denying her claims for supplemental security income disability benefits under Title XVI. On January 13, 2000 oral argument was heard by the magistrate judge at Oxford, with plaintiff and defendant Commissioner represented by their respective counsel.

The parties in the above entitled action have consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit.

The record shows that the plaintiff was born on September 20, 1949; that she has education through the seventh grade; and that she has no past relevant work experience. Plaintiff claims her condition became disabling in July 1992 as a result of her bladder and rectum problems and a bad back.

Applying the sequential evaluation process, 20 C.F.R. §404. 1520 (1992), the Administrative Law Judge (ALJ) found that plaintiff has not engaged in substantial gainful activity since July 15, 1992, and that the medical evidence establishes that plaintiff has severe impairments due to borderline intellectual functioning and a personality disorder, but that these impairments do not meet the listings. The ALJ found that plaintiff's testimony regarding the extent, intensity and duration of her subjective complaints are not credible. The ALJ also found that plaintiff has no exertional limitations, and has the residual functional capacity to perform the nonexertional requirements of simple, nonskilled, routine and repetitive work. Finding that plaintiff had no past relevant work, the

ALJ utilized the services of a vocational expert to carry the administration's burden to show that plaintiff could perform a significant number of jobs in the national economy such as order clerk, a dresser, an eye glass polisher, a molding machine tender, a subassembler of electronics, a poultry eviscerator, and a production solderer. (Findings, TR 22-23).

Plaintiff claims as error by the ALJ that she did not have adequate assistance of counsel at the hearing; that the ALJ mischaracterized plaintiff's abilities to perform daily household activities; that the ALJ did not include plaintiff's intellectual limitations in his hypothetical to the vocational expert present at the hearing; and that the vocational expert did not have benefit of the report of plaintiff's consultative examination which was conducted after the hearing.

The Commissioner has responded that plaintiff has no right to representation at the hearing, and has otherwise failed to show that the ALJ failed to adequately develop the record or conduct a full and fair hearing. Further, the Commissioner argues that the vocational expert is not called upon to consider medical evidence, but to assess the avail-ability of jobs based upon limitations given to him by the ALJ.

The scope of review in this case is narrow, and the court is limited to determining whether there is substantial evidence to support the findings and conclusions of the ALJ. Richardson v. Perales, 402 U.S. 389 (1971).

Plaintiff claims that she is disabled because of her "bad back," and because "my bladder and my rectum has fell [sic] for the third time." (TR 39). Plaintiff had a cystocele and rectocele repair in Septem-ber 1995 (TR 247-259), but told the consultative examiner, Dr. William W. Mayers, that she had no current problems because of these conditions (TR 260-262). Plaintiff testified at the hearing that she needed more surgery (TR 40), but has supplied no medical records to support this. Indeed, at the hearing plaintiff claimed that her current treating physicians were Dr. Beverly and Dr. Longest (TR 45), but she did not mention either doctor on her disability forms during the medical development of her case prior to the hearing (TR 69, 75, 121). Nonethe-less, the ALJ held the record

open for plaintiff to submit these records, but none were forthcoming despite counsel's assurances that he could supply them within a few weeks (TR 51-52).

The results of plaintiff's physical examination by Dr. Mayers revealed a full range of motion in all extremities, 80 degrees range of motion in forward bending with 20 degrees laterally (TR 261). Curiously, the physician noted no complaints of pain during any of these maneuvers (TR 261). Dr. Mayers found no tenderness, swelling, or muscle spasm either (TR 261). His final diagnosis was, "Back pain, etiology undetermined,"and "Status post-operative cystocele and rectocele repair, with no symptoms at this time." (TR 261).

Xrays taken in 1993 revealed a normal thoracic and lumbar spine area with a focal area of sclerosis involving the sacrum, SI joint and medial ileum (TR 153-154).

At the hearing before the ALJ, plaintiff testified that she had anxiety attacks since age 18 and saw mental health professionals in Texas during the 1980's (TR 46). There are no records of this treatment, and plaintiff told the social security administration claims representative on February 25, 1992 that she was not claiming a mental disability (TR 145). Indeed, none of her application forms mention a mental condi-tion. Again, on June 12, 1996, plaintiff told a state agency employee that she had no mental problems, had no history of mental problems, and had never received treatment for a mental condition (TR 226).

Plaintiff related previous mental problems to Dr. Peter Carson, a psychologist who performed her second consultative examination, but he stated that "it was very difficult to get her to engage in specifics and she tends to talk in gross generalities which are difficult to interpret adequately." (TR 267). Dr. Carson also found that plaintiff exaggerated her claims, and appeared highly motivated to receive disabil-ity benefits (TR 268). Although Dr. Carson found some anxiety, depression and personality disorder present, these conditions were "not to a severe level to interfere with employment." (TR 269). Dr. Carson found her "probably functioning in the borderline to mild range of retardation," and that her sub average intellectual functioning would "impede her ability to secure reasonable employment." (TR 269).

At oral argument before the undersigned, plaintiff argued that her intellectual deficits should have been included in the hypothetical to the vocational expert. Counsel argued further that Dr. Carson's report should have been submitted to the VE after the hearing for his consideration, or that the evidence regarding plaintiff's mental limitations should have been presented to the VE in interrogatories.

The Commissioner argued that Carson's report was not supportive of plaintiff's position, and may have resulted in a less restrictive assessment, e.g. Carson found plaintiff to be exaggerating her claims, and that her anxiety, depression and personality disorder would not interfere with her ability to work. The hypothetical presented by the ALJ stated:

> Q. Further, I do take note of the fact – excuse me– I do take note of the fact, Mr. Brawner [VE], that pain and discomfort, medication with it's side effects and factors of depression and anxiety, other psychic factors can interfere with one's ability to understand, to use judgement, to concentrate and to remember. Therefore to reduce those components to the best extent possible, consider that I might regard the claimant restricted to routine, repetitive unskilled work, which once learned becomes more automatic in its execution than those of more sophisticated character. Would note that the claimant does have the ability to do reading and writing."

(TR 55). In response to this hypothetical, the vocational expert found numerous jobs that plaintiff could perform. While the hypothetical did not include a "borderline to mild range of retardation" component, it is the court's opinion that the language, "take note of the fact, Mr. Brawner, that ... other psychic factors can interfere with one's ability to understand, to use judgment, to concentrate and to remember," meant that the VE should consider a limited intellectual ability. Further, the ALJ limited plaintiff to "routine, repetitive unskilled work, which once learned becomes more automatic...." This language, too, in the court's opinion states the obvious -– plaintiff is intellectually impaired. The consideration of Dr. Carson's report would not likely have changed the VE's opinion since it included no IQ scores or other objective tests to conclusively confirm her intellectual impairment –– Dr. Carson stated she was "probably" retarded, a suspicion shared by the ALJ and related to the VE in the hypothetical at issue.

As for plaintiff's argument about inadequate representation, the record belies any such contention. Plaintiff's counsel explained at oral argument that plaintiff had been represented by

Charlotte McDonnell, an attorney from Atlanta, Georgia, since March 1996, but that on the day of the hearing she elicited the assistance of John Barron, from Jackson, Mississippi, to attend the hearing on her behalf. Plaintiff was asked to sign an appointment of representation form right before the hearing, and apparently only learned of the "switch" at that time. Plaintiff argues that Barron did not now her, was not familiar with her case or the names of her doctors, and did not supply the medical evidence he promised after the hearing. At oral argument, plaintiff's counsel conceded that he had no authority to support his contention that inadequate assistance of counsel warrants a remand, and further conceded that the regulations do not require representation of any kind. See 20 C.F.R. §416.1503.

The Commissioner argued, and the record supports, that Barron conducted the majority of the inquiry and asked all the pertinent questions about past work, limitations on daily activities and pain (TR 29-48). The record also shows that Ms. McDonnell followed up with the ALJ after the hearing, supplying additional regulations and arguing against Dr. Carson's findings (TR 232-235). Although plaintiff contends that Barron did not supply additional medical evidence, the evidence referred to at the hearing has never been supplied by Ms. McDonnell or present counsel, which convinces the court that perhaps the evidence was non- existent. Plaintiff must show not only that she was denied a full and fair hearing because of counsel's failures, but that she was clearly prejudiced by these failures and that the hearing was unfair. Kane v. Heckler, 731 F.2d 1216, 1220 (5th Cir. 1984). Plaintiff has failed to make this showing.

The court finds plaintiff's argument that the ALJ mischarac-terized her ability to perform daily activities unsupported by the record. Her description of her abilities at the hearing (TR 44, 49) is consistent throughout the record (TR 77, 98, 107, 123, 260-61, 267). She does not lift anything heavy because of her bladder and back, she does light housekeeping, washes clothes, but has her husband or son hang them outside to dry, she visits infrequently, and has never driven a car because of her nerves. This is essentially what the ALJ recites in his findings (TR 18). Although plaintiff testified at the hearing that she mops and sweeps (TR 44, 49), she contradicts this in her reported

daily activities to Dr. Mayers (TR 261). The ALJ was entitled to weigh her credibility at the hearing and adopt her testimony as to these matters. Richardson v. Perales, supra at 400.

It is therefore the opinion of this court that the final decision of the Commissioner of Social Security should be affirmed, and this action dismissed with prejudice. A separate order in accordance with this opinion shall issue this same date.

THIS, the 14th day of January, 2000.

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UNITED STATES MAGISTRATE JUDGE

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FINAL JUDGMENT

In accordance with an Opinion entered this day, the parties in the above entitled action having consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit, it is hereby ordered and adjudged:

That the final decision of the Commissioner in the above entitled action be, and is hereby, affirmed, and that this action be dismissed with prejudice.

SO ORDERED, this, the 14th day of January, 2000.

UNITED STATES MAGISTRATE JUDGE